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February 21, 2012

VIA E-FILE

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

ENTERED
Office of Proceedings

FEB 21 2012

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Public Record

Re: Finance Docket No. 35131, *Vaughan Railroad Company - Construction and Operation of a Line of Railroad - in Monongalia County, WV*

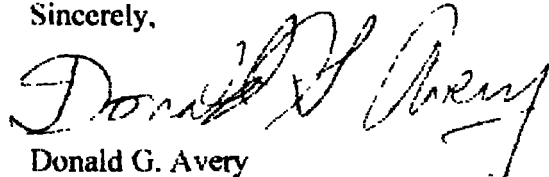
Dear Ms. Brown:

This is in response to a telephone inquiry from Mr. Scott Zimmerman of the Surface Transportation Board this afternoon regarding a figure shown on page 2 of the Petition for Exemption filed June 3, 2008 in this proceeding. Specifically, Mr. Zimmerman indicated that the figure for the expected volume of coal to be shipped over the proposed new line, as shown in line 6 on page 2, was unclear, and asked whether it was "85 million tons" or "8.5 million tons."

The correct figure is 8.5 million tons, as shown on the attached PDF copy of the Petition. We apologize for this apparent glitch in the production of the hard copies we filed in 2008.

Please give me a call if you have any questions regarding this response.

Sincerely,


Donald G. Avery
An attorney for the Vaughan Railroad
Company

Encl.

VAUGHAN RAILROAD COMPANY -)	
CONSTRUCTION AND OPERATION)	
OF A LINE OF RAILROAD - IN)	
MONONGALIA COUNTY,)	FINANCE DOCKET NO. 35131
WEST VIRGINIA)	
)	

Attorneys for Petitioner

VAUGHAN RAILROAD COMPANY -)	
CONSTRUCTION AND OPERATION)	
OF A LINE OF RAILROAD - IN)	
MONONGALIA COUNTY,)	FINANCE DOCKET NO. 35131
WEST VIRGINIA)	
)	

PREFACE

Although it is a common carrier, Vaughan does not presently conduct any rail operations, and it has no operating employees. Rather, rail operations over Vaughan's existing 18-mile long rail line in southern West Virginia are conducted by NS and CSX Transportation, Inc. ("CSX").¹

(continued...)

The new coal mine being developed by Wolfpen is located near Wadestown, WV, approximately 23 miles west of Morgantown, WV. When completed the new mine is expected to be one of the largest producers of bituminous coal in the eastern United States, and both the mine loading facilities and the new Mason-Dixon rail line will be designed to accommodate 150-car unit trains. The mine is expected to ship approximately 8.5 million tons of coal per year when it opens, which equates to an average of two unit train round trips per day, 300 days per year, on the new rail line. The mine will be capable of tripling its production as market conditions warrant, which would translate into as many as six unit train round trips per day on the new line.

The proposed new Mason-Dixon rail line, labeled the "Southern Route" on the map attached as Exhibit A, will connect with NS's Wana Spur just south of the Pennsylvania-West Virginia border at NS milepost 0.55, extend in a southwesterly direction along the West Virginia Fork of Dunkard Creek to a point just northeast of Wadestown, then turn northwest to reach a loading loop track that will be adjacent to the new mine.

The proposed rail construction and operation should be exempted under 49 U.S.C. §10502 from the prior approval requirements of 49 U.S.C. §10901, because the transaction implements the rail transportation policy and is limited in scope, and because detailed regulatory scrutiny of the proposal is not needed to protect shippers from an abuse of market power. Exemption of this construction is also consistent with a long line of decisions by the Surface Transportation Board and its predecessor, the Interstate Commerce Commission ("ICC") (collectively, the "STB"), exempting similar transactions

¹(...continued)
Corporation, a privately-held coal mining company that owned Vaughan.

under 49 U.S.C. §10502 from the 49 U.S.C. §10901 approval requirements.

BACKGROUND FACTS

The **Vaughan Railroad Company** is a West Virginia corporation formed in 1993 to assume common carrier responsibility for operation of a former CSX branch line, which CSX had proposed to abandon and for which another Amvest subsidiary, Terry Eagle Coal Company, had submitted a successful Offer of Financial Assistance. See AB-55 (Sub-No. 448x), *CSX Transportation, Inc.—Abandonment Exemption-- in Fayette and Nicholas Counties, WV* (decision served October 6, 1993). Vaughan then sought and obtained STB approval to extend its line to reach additional Amvest coal reserves, and also to construct a short connecting line to reach a nearby Conrail (now, NS) line. Finance Docket No. 32322, *Vaughan Railroad Company - Construction Exemption - Nicholas and Fayette Counties WV* (decision served October 27, 1994). In 1995, following completion of the aforesaid connection and extension, Vaughan granted non-exclusive trackage rights to both Conrail and CSX to operate over its lines.² Such shared operations have continued ever since, and accordingly Vaughan has never had to assume responsibility for conducting any rail operations.

Vaughan is an indirect, wholly-owned subsidiary of Amvest, which in turn is now wholly-owned by CONSOL.

Wolfpen Knob Development Company is a Virginia corporation, and is also a wholly-owned subsidiary of CONSOL.

CONSOL Energy Inc. is a Delaware corporation with principal offices at

²See Finance Docket No. 32670, *Consolidated Rail Corporation - Trackage Rights Exemption - Vaughan Railroad Company*, 60 Fed. Reg. 21553 (May 2, 1995), and Finance Docket No. 32695, *CSX Transportation Inc. - Trackage Rights Exemption - Vaughan Railroad Company*, 60 Fed. Reg. 28168 (May 30, 1995).

Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241. CONSOL, through various subsidiaries including Amvest, owns and operates 17 coal mining complexes, 16 of which are located east of the Mississippi River, and is the largest producer of coal in the eastern United States.

CONSOL will advance the funds needed by Vaughan to build the Mason-Dixon line, and expects to do so using internally-generated funds. Vaughan anticipates that construction of the Mason-Dixon line will take approximately 36 months following receipt of STB approval.

ARGUMENT

THE PROPOSED CONSTRUCTION AND OPERATION SHOULD BE EXEMPTED FROM THE PRIOR APPROVAL REQUIREMENTS OF 49 U.S.C. §10901

Under 49 U.S.C. §10901, the construction and operation of common carrier railroad lines requires the prior approval of this STB. Complicated and time-consuming procedures are promulgated under 49 C.F.R. Part 1150 for the pursuit of such approval. However, under 49 U.S.C. §10502, the STB is authorized to exempt proposed construction projects from those prior approval requirements when it finds that regulation is not necessary to carry out the nation's rail transportation policy, and that either the transaction is limited in scope, or application of the prior approval requirement is not needed to protect shippers.³

³Section 10502 reads in pertinent part:

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part -

Vaughan submits that the instant construction proposal clearly meets these §10502 criteria, and that the exemption should therefore be granted.

A. The STB has Jurisdiction Over this Construction Project.

Section 10901 vests this STB with plenary authority over the construction and operation of common carrier railroad lines.⁴ Section 10906 establishes a limited exception to that authority, providing in pertinent part that "[t]he Board does not have authority under this chapter [which includes §10901] over construction ... [or] operation ... of spur, industrial, team, switching, or side tracks." However, it is clear that the proposed construction and operation do not fall within the §10906 exception, and that

³(...continued)

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either -

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

⁴Section 10901 provides in pertinent part that

(a) A person may--

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) provide transportation over, or by means of, an extended or additional railroad line; or

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity

they are therefore subject to STB jurisdiction under §10901. This is so for two separate, independently-sufficient reasons:

first, the law is clear that the jurisdictional character of the proposed new line must be gauged with reference to its status *in Vaughan's hands*, see Docket No. 41986 *et al.*, *Effingham Railroad Company--Petition for Declaratory Order--Construction at Effingham, IL* (decision served September 18, 1998), at sheet 5 ("... because it was ERRC's initial railroad operation, this track segment became ERRC's entire line of railroad and was not, as to ERRC, a siding or spur"). The new line will enlarge Vaughan's track system by more than 27%, and as such can scarcely be deemed an exempt siding or spur; and

second, the new line will "invade" an entirely new territory not presently served by Vaughan (the new line is located more than 110 miles away from Vaughan's existing rail line). As such, the Mason-Dixon line must be deemed a jurisdictional extension, regardless of size. *See, e.g., Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U.S. 266 (1926).

B. STB Regulation is Not Necessary to Carry Out the Transportation Policy of 49 U.S.C. §10101:

Regulatory scrutiny of Vaughan's proposal to construct and operate the Mason-Dixon line is not needed to carry out the rail transportation policy set forth at 49 U.S.C. §10101. As noted *supra*, the proposed line will enable NS to serve CONSOL's new mine without having to invest its own capital in the construction, in furtherance of both a sound rail transportation system meeting the needs of the public (49 U.S.C. §10101(3)) and NS's revenue adequacy (49 U.S.C. §§10101(3), 10101(6)). Exemption of the proposed transaction will also minimize the need for federal regulation and reduce

barriers to entry, both of which further the national rail transportation policy, *see* 49 U.S.C. §§10101(2) and 10101(7).

The STB has recognized in a long line of decisions that regulation of the construction of short new rail lines to provide shippers with new rail service options is not necessary to carry out the national rail transportation policy. As observed by the ICC in an April, 1993 decision:

We have made findings in a series of construction [exemption] cases that the rail transportation policy favors the construction of new rail lines.^{12/}

^{12/} Finance Docket No. 31927, *Sibley Railway Company - Construction Exemption -- Jackson County, MO* (not printed), served February 24, 1992; Finance Docket No. 31972, *Southern Electric Railroad Company -- Construction Exemption -- Jefferson County, AL* (not printed), served March 17, 1992; Finance Docket No. 31989, *The Elk River Railroad, Inc. -- Construction and Operation Exemption -- Clay and Kanawha Counties, WV* (not printed), served May 28, 1992; Finance Docket No. 32010, *PSI Railroad, Inc. -- Construction Exemption -- Gibson County, IN* (not printed), served February 24, 1992; Finance Docket No. 32016, *Sioux & Western Railroad Company -- Construction Exemption -- Charles County, MO* (not printed), served March 25, 1992; Finance Docket No. 31717, *Iowa Power, Inc. -- Construction Exemption -- Council Bluffs, IA* (not printed), served December 20, 1990; *Mokena Illinois Railroad Company -- Construction Exemption -- Will County, IL* (not printed), served October 4, 1990; Finance Docket No. 31536, *Jackson County Port Authority -- Construction Exemption -- Pascagoula, MS* (not printed), served August 21, 1990; Finance Docket No. 31599 (Sub-No. 2), *Burlington Northern Railroad Company -- Connector Track Construction -- Near Waltonville in Jefferson County, IL* (not printed), served June 26, 1990; Finance Docket No. 31656, *Joppa and Eastern Railroad Co. -- Construction Exemption -- Joppa, IL* (not printed), served July 5, 1990; and Finance Docket No. 31498, *Southern Electric Generating Company -- Petition for Exemption -- Construction of a Rail Line in Shelby County, AL* (not printed), served September 19, 1989 (SEGCO).

Finance Docket No. 32158, *Gateway Western Railway Co. -- Construction Exemption -- St. Clair County, IL*, at sheets 4-5 (decision served May 11, 1993). *Accord*, *Burlington Northern R.R. -- Construction and Operation Exemption -- Macon and Randolph Counties, MO*, 9 I.C.C.2d 1161, 1166-1169 (1993), *aff'd sub nom. Missouri Mining, Inc. v. ICC*, 33 F.3d 980 (8th Cir. 1994).

The *ICC Termination Act of 1995*⁵ further liberalized the statutory standards governing STB review of rail line construction proposals, establishing a virtual presumption in favor of approval.⁶ As the STB explained in *Class Exemption for the Construction of Connecting Track Under 49 U.S.C. 10901*, 1 S.T.B. 75, 59 (1996), "there is now a presumption that construction projects will be approved."⁷

C. The Proposed Transaction is Limited in Scope, and Regulation is Not Needed to Protect Shippers from Market Power Abuses.

The rail line that Vaughan plans to build is less than six (6) miles long and will traverse primarily rural land. The STB has consistently classified rail construction projects of comparable or even greater size as limited in scope within the meaning of 49

⁵Pub. L. 104-88, 109 Stat. 803 (1995).

⁶Section 10901(c) now provides that

The Board *shall issue a certificate* authorizing activities for which such authority is requested in an application filed under [this section] *unless* the Board finds that such activities are inconsistent with the public convenience and necessity.

(Emphasis added.) Previously, 49 U.S.C. § 10901 had provided that if the ICC found proposed activities consistent with the public convenience and necessity, it "may" issue a certificate authorizing them.

⁷See also Finance Docket No. 34079, *San Jacinto Rail Limited Construction Exemption* (decision served August 28, 2002), at 6n.12; Finance Docket No. 34060, *Midwest Generation, LLC-Exemption from 49 U.S.C. 10901* (decision served March 21, 2002), at 7; and Finance Docket No. 33407, *Dakota, Minnesota & Eastern R.R. Construction Into the Powder River Basin* (decision served December 10, 1998), at 17.

U.S.C. §10502.⁸

Regulation is also not needed to protect shippers from market power abuses. To the contrary, because NS is the only rail carrier with rail lines near the proposed new mine, NS already has monopoly power over rates and service to shippers in the area, including CONSOL (which presently operates another coal mine, Blackstone No. 2, in nearby Wana, WV). Accordingly, the proposed new rail line will not give NS any greater market power than it already has over the rail traffic of CONSOL (or any other shipper that might in the future receive rail service over the proposed rail line). Indeed, if anything, by enlarging the volume of coal traffic that CONSOL can offer to NS, the new line might to some extent increase CONSOL's bargaining leverage vis-a-vis NS, offsetting to that extent NS's current market power over CONSOL and its customers.

CONCLUSION

For the reasons set forth above, Vaughan respectfully requests that this exemption petition be granted.

⁸See, e.g., Finance Docket No. 33387, *Southern Electric RR--Construction and Operation Exemption--West Jefferson, AL* (decision served July 16, 1997) (construction of a 4.5 mile common carrier rail line held to be limited in scope); Finance Docket No. 31989, *Elk River R.R. - Construction and Operation Exemption -- Clay and Kanawha Counties, WV* (Decision served May 28, 1992) (not printed) (construction of a 30-mile common carrier rail line held to be limited in scope); *Burlington Northern R.R. -- Construction and Operation Exemption -- Macon and Randolph Counties, MO, supra* (construction of a 17-mile common carrier rail line held to be limited in scope).

Respectfully submitted,

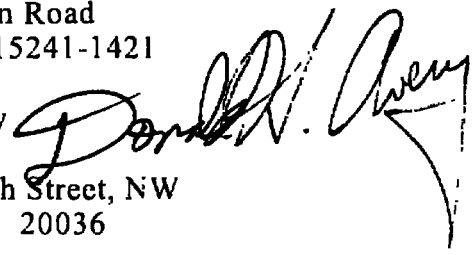
VAUGHAN RAILROAD COMPANY

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Dated: June 3, 2008

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Attorneys for Petitioner

Verification

COMMONWEALTH OF PENNSYLVANIA)
ALLEGHENY COUNTY) ss:

RAYMOND A. PERR, being duly sworn, deposes and says that he has read the foregoing Petition for Exemption, knows the contents thereof, and that the same are true as stated.

Raymond A. Perr further states that he is Manager of Special Projects for CONSOL Energy Inc., and that as such he is duly authorized to submit the foregoing verified petition on behalf of Vaughan.

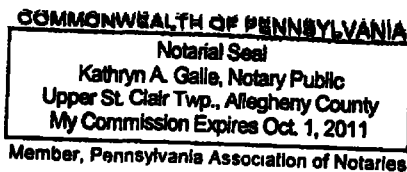
R.A. Perr

Raymond A. Perr

Subscribed and sworn to before me this 3rd
day of June, 2008.

Kathryn A. Galle

Notary Public in and for the
Commonwealth of Pennsylvania.



My Commission Expires October 1, 2011